ORIGINAL

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1986 TERM

No. 86-445

NEW YORK,

Petitioner,

-against-

JOHN SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the judgment of the New York Court of Appeals, based on state decisional law construing constitutional and statutory provisions, relied upon an adequate and independent state ground.

2. Whether this Court should deny the petition because the issue decided by the New York Court of Appeals is a purely factual one, involving the application of established law to a unique set of facts.

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BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

Respondent requests that this Court deny the petition for a writ of certiorari to review the judgment of the New York Court of Appeals, entered in the instant case on July 10, 1986. People v. Smith, 68 N.Y.2d 737, ___ N.E.2d ___ (1986).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 USC §1257(3). Respondent maintains that this Court lacks jurisdiction because the judgment of the New York Court of Appeals was based upon adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

The New York Constitution, article 1, section 6, provides, in pertinent part:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions....

The United States Constitution, Amendment VI, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defence.

The United States Constitution, Amendment XIV, provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

During the approximate year and a half prior to the commencement of trial, respondent was represented by the Legal Aid Society, by attorneys Lawrence Halfond and Peter Purvis. However, on January 22, 1976, prior to voir dire, respondent refused to appear and requested, in a written statement read into the record by Mr. Halfond, that his assigned counsel remove themselves from the proceedings:

> "It is my specific and pointed direction to my counsel, Lawrence Halfond, Esq., and Peter D. Purvis, Esq., of counsel to William J. Gallagher, that they not participate in any fashion in the trial of indictment number 1430 of 1974. I have specifically instructed Mr. Halfond and Mr. Purvis not to be present at any stage of the proceeding. I have given this matter a great deal of consideration and have arrived at my conclusion, as above indicated, after my counsel fully explained that my actions might be considered a knowledgeable and voluntary waiver of my right to be present at the trial of the indictment. . . ."

Respondent reasoned that a fair trial was impossible due to pre-trial publicity and the actions of the District Attorney's office, and that he wished not to participate in a case where he was being "railroaded." Counsel accordingly requested permission to withdraw, which request was denied by the court without explanation. Counsel then alternatively requested permission to sit mute, a request likewise denied by the court.

On February 3, 1976, prior to commencement of voir dire, respondent again requested, this time in person, that his assigned counsel remove themselves from participation in his defense. The court simply denied the request, without inquiry of respondent. Later that day, respondent protested that counsel would be "representing me against my will," but the court adhered to its ruling, again without inquiry of respondent, and directed counsel to proceed with the voir dire.

After the court addressed the first panel of prospective jurors, respondent again asked that his attorneys be "exclude[d]," and that he be permitted to represent himself. Initially failing to rule on the request, the court then acknowledged respondent's right "to participate in his own defense," but insisted that counsel remain to advise him; other than explain to respondent that the "law" required standby counsel to advise him for his own "protection," the court did not allocute respondent on his asserted right to proceed pro se. Moreover, when respondent asserted that he did not wish his attorneys to represent him, even in an advisory capacity, and wished to "conduct my own defense completely," the court simply denied his request without further discussion.

Still later, Mr. Halfond repeated that respondent wished to represent himself. The court reiterated, again without inquiry of respondent, that respondent could

"proceed" but that counsel was required to "partake in the proceeding" should respondent elect to stand mute. During the voir dire itself, counsel protested that the court was ordering counsel to participate in the proceedings over respondent's objection; respondent himself reiterated his request to proceed pro se. Again, the court repeated its ruling requiring counsel to participate actively in the proceedings.

During voir dire and throughout trial, counsel noted that respondent refused to assist in his defense and desired to remain mute, while respondent himself continually objected to counsel's active participation in the proceedings. Thus, over respondent's protest, counsel engaged in selection of the jury, examined and cross-examined witnesses, made various motions and legal requests, and presented a defense. Respondent was convicted of second degree murder (felony murder and intentional murder), attempted first degree robbery, third degree criminal possession of a weapon, and second degree criminal possession of stolen property. He was sentenced to 25 years to life per murder count, with lesser, concurrent sentences on the remaining counts.

On appeal to the New York Supreme Court, Appellate Division, Second Department, respondent's conviction was affirmed. The New York Court of Appeals reversed the judgment of conviction on July 10, 1986. The Court made a fact finding that respondent had made a "timely request

to proceed pro se." (A. 2).[1] The Court then analyzed People v. McIntyre, 36 N.Y.2d 10, 324 N.E.2d 322 (1974), which outlines the requirements, under the state constitution, imposed on a trial court before it may rule on a defendant's request to represent himself (A. 2). In its discussion, the Court quoted extensively from McIntyre, cited McIntyre three times, and once cited Faretta v. California, 422 U.S. 806 (1975), as a "see" cite (A. 2). Applying the McIntyre criteria, the Court held:

> Here, the trial court rejected, out of hand, defendant's timely request to proceed pro se without determining whether it was knowingly or intelligently made or whether it was a good faith attempt to exercise his "right...to determine his own destiny" (People v McIntyre, 36 NY2d at p 14, supra) (A. 2).

Having thus found that the court's ruling denying respondent's request to proceed pro se was procedurally defective under McIntyre, the Court, in dicta, added:

> Additionally, the court compelled assigned counsel to participate and to take specific actions with respect to the conduct of the trial, under threat of contempt, despite defendant's contrary directions and repeated objections. By so doing, the trial court denied defendant his constitutional right to present his own defense (see Faretta v California, 422 US 806, 835-36, supra; People v Vivenzio, 62 NY2d 775, 776; People v Davis, 49 NY2d 114, 120) (A. 2).

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[1] References are to the Appendix annexed to the petition for a writ of certiorari, which reproduces the New York Court of Appeals decision.

The three dissenting judges agreed that "the procedures outlined in People v McIntyre" were not followed, in that the

> trial court made no finding that defendant's request was unequivocal and timely; it conducted no inquiry to determine whether defendant's waiver of the right to counsel was knowing and intelligent. And there was no finding as to whether defendant was engaging in obstreporous conduct, or whether his conduct was calculated to undermine, upset or unreasonably delay the progress of the trial, which would have forfeited defendant's right to self-representation (A. 7).

Disputing, however, the factual finding by the majority that respondent's request was in fact timely, the dissent found that the trial court had acted within its discretion in denying the request (A. 3, 8-9).

ARGUMENTS IN OPPOSITION TO THE PETITION

POINT I

THIS COURT LACKS JURISDICTION BECAUSE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS, BASED ON STATE DECISIONAL LAW CONSTRUING STATE CONSTITUTIONAL AND STATUTORY PROVISIONS, RELIED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In Michigan v. Long, 463 U.S. 1032 (1983), this Court reiterated the salutary purposes of the jurisdictional doctrine of adequate and independent state grounds as ensuring "[r]espect for independence of state courts, as well as avoidance of rendering advisory opinions." Id. at 1040; accord Herb v. Pitcairn, 324 U.S. 117, 126-

28 (1945). However, after charting the checkered course that that doctrine's application had taken in cases involving "'ambiguous or obscure adjudications in state courts,'" 463 U.S. at 1041 (cite omitted), this Court, again confronted with such ambiguity, held:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law grounds is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. Thus, this Court created a presumption that the state court did not rely on adequate and independent state grounds where it was "not clear from the opinion itself" and "when it fairly appears that the state court rested its decision primarily on federal law." Id. at 1042. The presumption would be overcome if the state court issued a "plain statement. . .that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id. at 1041.

The facts of Long -- the "as in this case" context in which the holding was announced -- are illuminating. The state court's only two references to the state constitution were coupled with parallel cites to the federal constitution, "[n]ot a single state case" was cited, and

the opinion otherwise "relied exclusively on federal law." Id. at 1037 n.3, 1043. Thus it appeared "that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe ...its own law in the manner it did.' Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)." Id. at 1044.

Thus, because Long unequivocally referred to, and involved, a state court opinion where discussion of federal and state law was "interwoven" so that the decisional ground was "ambiguous or obscure," where the state court rested "primarily" on federal law, and where the state court appeared "compelled" to have reached its result under federal law, it makes clear that the presumption and plain statement rule apply only in such cases. Long's presumption and plain statement rule has been applied to other ambiguous state court decisions, with the resultant finding of no adequate and independent state grounds. See, e.g., New York v. Class, ___ U.S. ___, 106 S.Ct. 960, 964 (1986) (mention of state constitution was in "direct conjunction" with federal constitution, and legal analysis depended on federal as well as state cases); Ohio v. Johnson, 467 U.S. 493, 497-98 n.7 (1984) (ambiguous reference to "double jeo-

pardy," no state law ground expressly articulated, and constitutional discussion centering on federal cases).[2]

In this light, the Long presumption and plain statement rule are inapplicable to the instant case. There is, quite simply, no ambiguity to resolve, no primary reliance on federal precedent, no interwoven federal analysis, and no apparent compulsion by the New York court to follow federal law. Rather, the decision of the New York Court of Appeals relied on state decisional law -- People v. McIntyre, 36 N.Y.2d 10, 324 N.E.2d 322 (1974) -- which, in turn, construed state constitutional and statutory provisions.

In an effort to avoid the state constitutional basis for the holding of the New York of Appeals, petitioner, while recognizing that Court's reliance on McIntyre, asserts that McIntyre itself depended for support on federal case law (Petition for Cert. at 7). What petitioner notably neglects to mention, however, is that the

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[2] In Caldwell v. Mississippi, ___ U.S. ___ , 105 S.Ct. 2633 (1985), the adequate and independent state ground urged by respondent was one of procedural waiver. However, the state appellate court had addressed the merits of the legal issue, despite the apparent waiver, in accordance with its tradition of ignoring procedural bars in capital cases. Since the state court appeared to have actually rejected the application of its procedural rule, that rule clearly provided no adequate and independent state ground. 105 S.Ct. at 2639. Thus, petitioner's reliance on Caldwell for the unremarkable proposition that the "state court must have actually relied on the state ground," Petition for Cert. at 7, is misplaced.

McIntyre Court went on to state:

> Notwithstanding this plethora of [federal] authority, the United States Supreme Court has never specifically determined whether or not the right to conduct one's own defense is constitutionally guaranteed. This question may be resolved shortly in the case of Faretta v. California (No. 73-5773, argued Nov. 19, 1974).
>
> However, our court need not reach the question of whether the right to defend pro se is founded in the Federal Constitution because the New York State Constitution and criminal procedure statute clearly recognize this right [cites omitted]. Furthermore, our court has repeatedly acknowledged the defendant's right to conduct his own defense [cites omitted].

36 N.Y.2d at 15, 324 N.E.2d at 326.[3] The Court then outlined the procedural requirements governing a defendant's assertion of his right to represent himself and the trial court's ruling thereon. 36 N.Y.2d at 17-19, 324 N.E.2d at 326-28. McIntyre's vitality as a decisional anchor independent of, and indeed fore-shadowing, Faretta and its federal counterpart could not be clearer. Indeed, when respondent argued, in his brief submitted to the Court of Appeals, that the right of self-representation was guaranteed independently under state con-

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[3] Indeed, the state constitutional provision, quoted on p. 1, ante, is not only worded quite differently than its federal analog but also, unlike the federal provision, expressly guarantees a right to "defend in person." State statutes, cited in McIntyre, contain similar express guarantees. E.g., N.Y. Crim. Proc. Law §§ 170.10(6), 180.10(5), 210.15(5).

stitutional and statutory provisions as interpreted by McIntyre, petitioner here conceded as much. Brief for Defendant-Appellant at 25; Brief for Respondent at 30-31.

The New York Court of Appeals in the instant case invoked and relied on this independent state foundation. As petitioner recognizes, Petition for Cert. at 6, the Court's decision had two grounds, the first one being that respondent had been denied his right to proceed pro se because the trial court had failed to ascertain, through appropriate inquiry, whether respondent's request was voluntary, intelligent, and in good faith. In reaching that conclusion, the Court first directly quoted the language in McIntyre establishing a defendant's pro se right. (A. 2). In what was the only reference to federal law in the entire analysis of the first ground of the Court's decision, a "see" cite to Faretta followed (A. 2).[4] The Court of Appeals then discussed the requirement of a thorough allocution by the trial court and of a waiver made intelligently and voluntarily; only McIntyre was cited as support (A. 2). The Court next discussed a trial court's remedy when confronted with a "disingenuous" pro se request; again, only McIntyre was relied upon (A. 2). Finally, when the Court applied these criteria to reach its conclusion that the trial

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[4] Notably, a "see" cite, rather than the more direct "accord" cite was used. See A Uniform System of Citation, Rule 2.2 (13th ed.); Official N.Y. Law Reports, Style Manual at 17 (1985)(following A Uniform System of Citation for New York practice).

court had failed to conform to the principles thus far articulated, only McIntyre was invoked in support (A. 2).[5]

In stark contrast to cases deserving application of the presumption and plain statement rule, see pp. 7-9, ante, the Court's opinion below clearly articulated an independent state ground. Not only was federal law neither relied upon "primarily" nor inextricably interwoven with the state law discussion, but it was also utterly superfluous to the Court's decision. The single "see" cite to Faretta was but a recognition of the fact that the United States Constitution had, since McIntyre, been similarly interpreted. Indeed, the very fact that McIntyre predated Faretta, and formed an essential part of the analysis and ultimate holding below, belies any conclusion that the New York court "felt compelled by what it understood to be federal constitutional considerations to construe...its own law in the manner it did." Zacchini v. Scripps-Broadcasting Co., 433 U.S. 562, 568 (1977); accord Michigan v. Long, 463 U.S. at 1044 (quoting Zacchini).

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[5] Indeed, the dissent itself acknowledged the trial court's failure to adhere to the procedural guidelines outlined in McIntyre, and disputed only the factual finding as to the timeliness of respondent's request (A. 7-9). Timeliness, moreover, has been defined as a matter of state law in McIntyre, 36 N.Y.2d at 18, 324 N.E.2d at 328.

Accordingly, any decision by this Court as to the application of Faretta to the facts of the instant case would undoubtedly be an advisory opinion, as the truly independent state law analysis in McIntyre was and will be the mainstay of the Court's holding below. It is precisely to avoid the rendering of such advisory opinion that this Court should conclude that an adequate and independent state ground supports the judgment below and that it lacks jurisdiction to review that judgment.[6]

POINT II

THIS COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE DECIDED BY THE NEW YORK COURT OF APPEALS IS A PURELY FACTUAL ONE, INVOLVING THE APPLICATION OF ESTABLISHED LAW TO A UNIQUE SET OF FACTS.

Petitioner claims that, assuming no jurisdictional bar, this Court should review two issues: the role of

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[6] The Court of Appeals, as noted on p. 5, ante, had an alternative holding: that, after unconstitutionally depriving respondent of his right to proceed pro se, the trial court committed additional error by interfering with respondent's selection of defenses. Thus, the Court of Appeals found that the trial court's insistence that counsel present an active defense, when respondent desired counsel to remain mute, denied respondent "his constitutional right to present his own defense," citing both Faretta and two state cases (A. 2). Arguably, the state law basis for this alternative holding was either ambiguous or interwoven with federal law, so that it could be defeated by Long's plain statement rule. However, this aspect of the Court's decision was pure dictum. Its status as dictum is evident by the fact that it was prefaced by the word "additionally" and followed the more extensive analysis and application of McIntyre

(footnote cont'd)

standby counsel under, and the New York Court of Appeals' failure to consider, McKaskle v. Wiggins, 465 U.S. 168 (1984) [Petition for Cert., Point Two]; and the right of a criminal defendant to stand mute as his defense [Id., Point Three]. These questions, both ancillary to the New York Court of Appeals' central holding, do not merit this Court's review.

Petitioner first claims that the Court of Appeals erred in relying on Faretta v. California, 422 U.S. 806 (1975), and ignoring McKaskle v. Wiggins, supra. Petition for Cert. at 9-10. Petitioner asserts that "in the instant case, the trial court permitted respondent to conduct his own defense completely, although it required assigned counsel to remain on a standby basis to guide him." Accordingly, petitioner concludes that it is McKaskle's pronouncement on the role of standby counsel which should govern this case, not Faretta's holding concerning the standard to be applied when a defendant wishes to proceed pro se. Id. at 10-11. Petitioner's argument, however, misconstrues both the factual and legal basis of the New York Court of Appeals decision.

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footnote cont'd)

to the primary holding concerning the insufficient allocution on the pro se request. Thus, since notwithstanding this addendum, the Court found a state constitutional violation requiring reversal, this alternative, secondary holding was not necessary to the disposition of the case and, as dictum, is not subject to this Court's review.

First, the Court of Appeals specifically found that "the trial court rejected, out of hand, defendant's timely request to proceed pro se" (A. 2). Thus, despite petitioner's view that the "trial court permitted respondent to conduct his own defense completely," the fact-finding by the state court is to the contrary. Indeed, the entire New York Court of Appeals agreed that respondent's request to proceed pro se had been rejected, with the dissent disputing only whether the trial court acted within its discretion in so doing.

Second, petitioner thereby misconstrues the legal holding of the Court of Appeals. The Court's discussion focused on the procedural requirements which must attend a trial court's ruling on a defendant's request to represent himself, including a thorough allocution of the defendant, to satisfy the standard articulated in People v. McIntyre, 36 N.Y.2d 10, 324 N.E.2d 322 (1974).[7] Applying those criteria to the instant facts, the Court found a constitutional violation because the trial court's ruling -- rejecting respondent's request to represent himself -- was issued without conformance to these procedural safeguards. Again, even the dissent concurred as to the procedural defects, and differed only as to the factual conclusion concerning the timeliness of respondent's request. Thus, for the entire Court, the issue

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[7] A similiar standard is articulated in Faretta. 422 U.S. at 835-36

involved a simple application of established doctrine to a particular set of facts. And, once the majority found a constitutional violation in the manner in which the trial court disposed of respondent's request, the substantive questions -- whether, and subject to what conditions, respondent should have been allowed to proceed pro se -- were utterly superfluous.

For these reasons, the Court of Appeals did not address, and need not have considered, the relevance of McKaskle. McKaskle, as petitioner correctly notes, permits a court to appoint standby counsel to assist a defendant who has otherwise been permitted, consistent with Faretta, to proceed pro se. 465 U.S. at 173-79. Faretta, in turn, recognizes a defendant's right to proceed pro se and outlines the obligation of a trial court to allocute the defendant and otherwise ensure that his decision is voluntary and intelligent. 422 U.S. at 835-36. Here, because the Court of Appeals found that the trial court had not permitted respondent to represent himself, and that its ruling was procedurally (and, hence, constitutionally) defective, the threshold question under Faretta was dispositive, and the issue of standby counsel irrelevant.[8]

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[8] Indeed, even if one accepts petitioner's characterization that the trial court permitted respondent to proceed pro se, one could not reach the McKaskle question without first deciding the Faretta issue. Under Faretta,

(footnote cont'd)

Accordingly, petitioner's efforts to couch the issue as a misapplication of McKaskle are unavailing.[9]

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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MIRIAM J. HIBEL
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October, 1986

(footnote cont'd)

a decision permitting a defendant to represent himself will not be upheld unless the trial court, through appropriate inquiry, determines that the request is voluntary and intelligent. Since the entire Court of Appeals found the safeguards lacking - a fact not disputed by petitioner here - a ruling permitting respondent to proceed pro se would have been as procedurally erroneous as one denying him that right. McKaskle, which assumes a proper ruling under Faretta, would still be irrelevant.

9 For similar reasons, petitioner's argument in Point Three, that a defendant is not entitled to stand mute as his defense, is not reviewable. Once the Court of Appeals found constitutional error in the trial court's summary denial, without sufficient allocution, of respondent's request to represent himself, its further discussion of the interference with respondent's selection of defenses was clearly dictum. See note 6, p. 13, ante. Thus, petitioner, as with the McKaskle argument, is urging this Court to review questions of law ancillary and superfluous to the Court of Appeals' basic holding -- a simple application of McIntyre (or even Faretta) to the facts of this case.